Tun Datuk Haji Mustapha bin Datuk Harun v State Legislative Assembly of Sabah & Anor

HIGH COURT (KOTA KINABALU) — ORIGINATING MOTION NO K 42 OF 1992
SYED AHMAD IDID J
22 SEPTEMBER 1992

Civil Procedure *— Striking out — Application to strike out claim for declaration that provision in state constitution invalid — Claim based on hypothetical facts — State constitution provided that member of state legislative assembly who resigns from political party shall cease to be member of assembly — Plaintiff member of state legislative assembly — Plaintiff's seat vacated upon his resignation from political party — Plaintiff subsequently re-elected as member of another political party — Fear of being expelled from assembly if plaintiff resigns from current political party — Whether plaintiff had locus standi to commence action — Whether claim was scandalous, frivolous or vexatious*

Constitutional Law *— State constitution — Validity — Claim for declaration that provision in state constitution invalid — State constitution provided that member of state legislative assembly who resigns from political party shall cease to be member of assembly — Plaintiff member of state legislative assembly — Whether plaintiff had locus standi to commence action — Whether claim was scandalous, frivolous or vexatious — Sabah State Constitution art 18(2)(d) — Federal Constitution art 10(1)(c)*

Civil Procedure *— Parties — Proper party to be sued — Claim for declaration that provision in state constitution invalid — State constitution provided that member of state legislative assembly who resigns from political party shall cease to be member of assembly — Whether state legislative assembly was proper party to be sued — Whether state legislative assembly was responsible for its action*

In 1990 the plaintiff won a seat in the state legislative assembly, the first defendant, as a member of the United Sabah National Organization ('USNO'). The plaintiff resigned from USNO in February 1991 and joined the United Malays National Organization ('UMNO'). Due to the plaintiff's resignation from USNO, his seat in the first defendant was vacated by virtue of art 18(2)(d) of the Sabah State Constitution. A by-election was held in May 1991 and the plaintiff retained his seat as a member of UMNO. In May 1992 the plaintiff applied for a declaration that art 18(2)(d) is ultra vires art 10(1)(c) of the Federal Constitution.

The defendants applied to the court, inter alia, to strike out the plaintiff's claim. The first defendant argued, firstly, that it was not a proper party in this case because it had no direct interest in the outcome of the case, and there was no allegation of impropriety against it nor was there any relief sought against the first defendant. The defendants then contended that the plaintiff had no locus standi to commence the action. The plaintiff, however, alleged that he and other members of the first defendant had a real fear that they might be expelled from the first defendant if they resigned from their current political parties. The defendants further argued that the plaintiff's

A claim was merely theoretical and there was no dispute in existence. The defendants also alleged that the plaintiff's claim was based on hypothetical facts because there was no indication that the plaintiff was contemplating leaving UMNO. The defendants argued, lastly, that due to the plaintiff's delay in instituting the proceedings, the issue had become an academic one because the plaintiff should have commenced action at the time when he had to vacate his seat upon his resignation from USNO.

Held, dismissing the application:

(1) Upon considering the provisions of the Federal Constitution and the Sabah State Constitution, it is manifest that the first defendant is responsible and accountable for its actions. Accordingly, the first defendant was not wrongly cited in this case.

(2) Courts do not encourage litigation but the trend is to allow plaintiffs to sue even though they have no real grievance or injury at all. There will be a grave lacuna in the system of public law if a group or even a single public-spirited taxpayer is prevented by outdated technical rules of locus standi from bringing a matter to court to vindicate the rule of law and to get the unlawful conduct stopped.

(3) It should suffice if a plaintiff has some genuine interest in having his legal position declared even though he could get no other relief. A 'person aggrieved' cannot include a mere busybody but can include a person who has a genuine grievance because an order has been made which prejudicially affects his interest.

(4) In this case, there was no reason to deny standing to the plaintiff as a person aggrieved because he had been affected by art 18(2)(d) when he resigned from USNO and this would recur if he were to resign from UMNO.

(5) The plaintiff's claim was not scandalous, frivolous or vexatious. Nor could it be said to be theoretical, abstract, hypothetical, premature or academic. The plaintiff's claim had raised a substantive issue for determination by the court.

[Bahasa Malaysia summary

Pada tahun 1990, plaintif telah memenangi kerusi di dalam dewan undangan negeri, defendan pertama, sebagai ahli USNO. Plaintif telah meletakkan jawatannya di USNO pada Februari 1990 dan memasuki UMNO. Disebabkan perletakan jawatan plaintif di USNO, kerusinya di dalam defendan pertama telah dikosongkan mengikut perkara 18(2)(d) Perlembagaan Negeri Sabah. Suatu pilihanraya kecil telah diadakan pada Mei 1991 dan plaintif telah mengekalkan kerusinya sebagai ahli UMNO. Pada Mei 1992, plaintif telah memohon deklarasi bahawa perkara 18(2)(d) itu adalah ultra vires perkara 10(1)(c) Perlembagaan Persekutuan.

Defendan telah memohon kepada mahkamah, antara lain, untuk membatalkan tuntutan plaintif. Defendan pertama telah berhujah,

pertamanya, bahawa ia bukan pihak yang sesuai di dalam kes ini kerana ia tidak mempunyai kepentingan langsung dalam keputusan kes ini, dan tidak terdapat tuduhan ketidaksopanan terhadapnya ataupun terdapat sebarang relief yang diminta terhadap defendan pertama. Defendan telah berhujah bahawa plaintif tidak mempunyai locus standi untuk memulakan tindakan itu. Tetapi plaintif telah mengatakan bahawa beliau dan ahli-ahli defendan pertama yang lain benar-benar takut yang mereka mungkin dipecat dari defendan pertama jika mereka meletakkan jawatan mereka di parti politik mereka sekarang. Defendan seterusnya berhujah bahawa tuntutan plaintif adalah bersifat teori sahaja dan tidak terdapat pertikaian yang wujud. Defendan juga mengatakan bahawa tuntutan plaintif adalah berdasarkan fakta hipotesis kerana tidak terdapat tanda yang plaintif sedang berfikir-fikir hendak meninggalkan UMNO. Defendan juga berhujah, pada akhirnya, bahawa disebabkan kelewatan plaintif dalam memulakan prosiding itu, isu itu telah menjadi isu akademik kerana plaintif sepatutnya memulakan tindakan pada masa beliau terpaksa mengosongkan kerusinya apabila beliau meletakkan jawatannya di USNO.

Diputuskan, menolak permohonan itu:

(1) Setelah mempertimbangkan peruntukan-peruntukan Perlembagaan Persekutuan dan Perlembagaan Negeri Sabah, adalah jelas bahawa defendan pertama bertanggungjawab terhadap tindakannya. Dengan itu, defendan pertama tidak salah dinamakan di dalam kes ini.

(2) Mahkamah tidak menggalakkan litigasi tetapi arah aliran adalah untuk membenarkan plaintif mendakwa walaupun mereka tidak langsung mempunyai kilanan atau kerugian yang benar. Akan terdapat suatu lakuna yang serius di dalam sistem undang-undang awam jika sekumpulan ataupun pembayar cukai tunggal yang bersemangat awam di halang oleh kaedah teknikal locus standi yang sudah lapuk dari membawa suatu perkara kepada mahkamah untuk menjustifikasikan kedaulatan undang-undang dan untuk menghentikan kelakuan yang menyalahi undang-undang itu.

(3) Sepatutnya cukup jika plaintif mempunyai kepentingan tulen dalam mendapatkan kedudukannya dari segi undang-undang diisytiharkan walaupun beliau tidak boleh mendapat sebarang relief yang lain. 'Seorang yang terkilan' tidak boleh termasuk seorang yang hanya suka mencampuri urusan orang lain tetapi boleh termasuk seorang yang mempunyai kilanan tulen kerana suatu perintah telah dibuat yang memudaratkan kepentingannya.

(4) Di dalam kes ini, tidak terdapat sebarang sebab untuk menafikan kedudukan kepada plaintif sebagai seorang yang terkilan kerana beliau terjejas oleh perkara 18(2)(d) itu apabila beliau telah meletakkan jawatannya di USNO dan ini akan berlaku semula jika beliau meletakkan jawatannya di UMNO.

(5) Tuntutan plaintif bukanlah bersifat skandal, remeh atau menyusahkan. Ianya juga bukan bersifat teori, abstrak, hipotesis,

pramasa atau akademik. Tuntutan plaintif telah menimbulkan isu substantif untuk diputuskan oleh mahkamah.]

Cases referred to

1 *Cox v Green* [1966] Ch 216; [1966] 1 All ER 268 (refd)
2 *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 (refd)
3 *Nordin bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Ors* [1992] 1 MLJ 343 (refd)
4 *Syarikat Banita Sdn Bhd v Government of State of Sabah* [1977] 2 MLJ 217 (refd)
5 *East Union (Malaya) Sdn Bhd v Government of State of Johore and Government of Malaysia* [1980] 2 MLJ 143 (refd)
6 *City Council of George Town & Anor v Government of State of Penang & Anor* [1967] 1 MLJ 169 (refd)
7 *Malaysian Bar & Anor v Government of Malaysia* [1986] 2 MLJ 225 (refd)
8 *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli (No 2)* [1967] 1 MLJ 46 (distd)
9 *IRC v National Federation of Self Employed & Small Businesses Ltd* [1982] AC 617; [1981] 2 All ER 93 (refd)
10 *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 (refd)
11 *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 (refd)
12 *Lim Cho Hock v Government of State of Perak & Ors* [1980] 2 MLJ 148 (folld)
13 *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 (refd)
14 *Boyce v Paddington Borough Council* [1903] 1 Ch 109 (refd)
15 *Syarikat Perkapalan Selatan Sabah Sdn Bhd v State Government of Sabah & Ors* [1991] 1 MLJ 370 (folld)
16 *Blackburn v A-G* [1971] 1 WLR 1037 (refd)
17 *R v Greater London Council, ex p Blackburn* [1976] 3 All ER 184; [1976] 1 WLR 550 (refd)
18 *R v Metropolitan Police Commissioner, ex p Blackburn* The Times, 7 March 1980 (unreported) (refd)
19 *R v Horsham Justices, ex p Farquharson & Anor* [1982] QB 762; [1982] 2 WLR 430 (folld)
20 *Australian Conservator Foundation Incorporated v Commonwealth of Australia & Ors* (1980) 28 ALR 257 (distd)
21 *Thornhill v Weeks* [1913] 1 Ch 438 (refd)
22 *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403; [1968] 2 All ER 686 (refd)
23 *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147 (refd)
24 *Draper v British Optical Association* [1938] 1 All ER 115 (refd)
25 *Ruislip-Northwood Urban District Council v Lee* (1931) 145 LTR 208 (refd)
26 *Roesin v A-G* (1918) 34 LTR 417 (refd)

27 *Odhams Press Ltd v London & Provincial Sporting News Agency* [1936] Ch 357; [1936] 1 All ER 217 (refd)
28 *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417; 95 SJ 44 (distd)
29 *Waterson v Hendon Borough Council* [1959] 2 All ER 760; [1959] 1 WLR 985 (distd)
30 *Whyte, Risdale & Co v A-G* [1927] 1 Ch 548 (distd)
31 *A-G v Colchester Corporation* [1955] 2 QB 207 (distd)
32 *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 (refd)
33 *Dyson v A-G* [1911] 1 KB 410 (folld)
34 *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 (refd)
35 *Ibeneweka v Egbuna* [1964] 1 WLR 219; 108 SJ 114 (refd)

Legislation referred to

Federal Constitution arts 10(1)(c), 160(1)
Constitution (Sabah) arts 6(6), 13, 14, 18(2)(d), 19, 21(3), 24(1), 25, 26(1)
Constitution (Amendment) Enactment 1986 (Sabah)
Rules of the High Court 1980 O 12 r 7, O 15 r 16, O 18 r 19

Stephen Foo (State Attorney-General, Sabah) for the applicants/first and second defendants.

Zaki Tun Azmi and *Hajjah Azizah Mohd Dun* (*Azizah Joifin Mohd Dun & Co*) for the respondent/plaintiff.

Cur Adv Vult

Syed Ahmad Idid J: This court is being moved by both defendants to set aside and to strike out the application by the plaintiff for a declaration that art 18(2)(d) of the Sabah State Constitution is invalid, null and void as it is ultra vires art 10(1)(c) of the Federal Constitution.

The plaintiff filed his originating summons on 4 May 1992. The first and second defendants filed in their summons-in-chambers under O 12 r 7 and/or O 18 r 19 of the Rules of the High Court 1980 on 10 June and 29 July respectively, citing the grounds that:

(a) the plaintiff has no locus standi to commence this action;
(b) the facts relied on by the plaintiff disclose no reasonable cause of action against the defendants;
(c) there being no dispute/live dispute in existence, the issue raised by the plaintiff is theoretical;
(d) the action is frivolous, vexatious and an abuse of the process of the court.

The first defendant added another ground in support, ie that it was wrongly cited as defendant in this action. Accordingly, both defendants ask that the plaintiff's action be stayed or dismissed and for their costs.

I propose to deal with the grounds raised by the defendants in the following order. Firstly, on whether the first defendant is a proper party. If it is not, then it is excluded and the second defendant becomes the only defendant. If I rule otherwise, then both defendants remain as they are.

Next, I shall deal with the issues against the plaintiff: (i) whether he has locus standi; (ii) if he has, then whether his summons-in-chambers is grounded on facts which put an issue to the test and whether such an issue is justiciable — see *Cox v Green*;[1] (iii) even if the issue is justiciable, I shall consider, on the contention of the defendants, if there is any dispute; and (iv) finally, to discover if the dispute concerns a live issue. If the issue is dead, there need not be any further proceedings.

Is the state legislative assembly of Sabah a proper party?

Datuk Stephen Foo, the learned Sabah State A-G, outlined the undisputed facts that the state legislative assembly ('the Assembly') passed the Constitution (Amendment) Enactment 1986 on 20 May 1986, which was assented to by the Yang di-Pertua Negeri on the same day and became law. The enactment amended the State Constitution by the introduction of a new para (d) to cl (2) of art 18 which deals with the tenure of seats of members of the State Legislative Assembly.

Who is the plaintiff in relation to the Assembly? Tun Datuk Haji Mustapha bin Datuk Harun, the plaintiff, is a member of the assembly for the constituency of Usukan. He won the Usukan seat in the general elections in 1990 on the ticket of United Sabah National Organisation (USNO). On 23 February 1991, he resigned from USNO to join the United Malays National Organisation (UMNO). He is UMNO's deputy liaison chairman and Supreme Council member. Due to his resignation from USNO, his seat was vacated by operation of law by virtue of art 18(2)(d) of the State Constitution. A by-election was held on 11 May 1991 and the plaintiff retained the seat.

The learned state A-G contends that the Assembly is not a proper defendant because:

(i) there is no allegation of impropriety nor is there any relief sought against it; and
(ii) that the Assembly has no direct interest in the outcome of his action.

In support, is cited De Smith's *Judicial Review of Administrative Action* (1980) at p 510 and *Pegang Mining Co Ltd v Choong Sam & Ors*[2] where at pp 55–56 Lord Diplock observed that:

> It has been sometimes said as in *Moser v Marsden* and in *In re IG Farbenindustrie AG* that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected ... A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

Dato' Zaki Tun Azmi, counsel for the plaintiff, submits that the Assembly is the proper party as:

(a) the Assembly as a body is responsible for determining the status of the plaintiff and the other members — see art 19 of the Sabah State Constitution;

(b) it was the Assembly who passed the law — see arts 13 and 14 (which set out the constitution of the legislature and the composition of the assembly respectively); and
(c) the Assembly was accepted as the proper party in *Nordin bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Ors*.[3] The Sabah Constitution in this respect is similar to the Kelantan Constitution, and accordingly the plaintiff has to act against the Assembly as the Assembly decides the plaintiff's position unlike several other cases where the Dewan Negara 'has no interest at all'.

While the state A-G says the Assembly is not a legal entity, counsel for the plaintiff argues that the Assembly 'acts as a whole body and not as individuals, and it continues to act as a body though individuals are being replaced after every general election.'

The defendants' counsel cited these cases where the governments of the city, state or federation had been made parties and 'nowhere was the State Assembly or Parliament been joined': *Syarikat Banita Sdn Bhd v Government of State of Sabah*[4] and *East Union (Malaya) Sdn Bhd v Government of State of Johore and Government of Malaysia*.[5] I do not consider them as giving strength to the defendants' contention as both cases deal with applications for leave. In *Banita*,[4] the Sabah government had cancelled the timber concession and in *East Union*[5] the applicant's rubber estate was forfeited to the Johore government. The state government in each was directly involved. In *City Council of George Town & Anor v The Government of State of Penang & Anor*,[6] it was clearly stated that 'The State of Penang has the power to enact ...' and so the state government became the defendant. The Malaysian Bar did not bring in Parliament as a party in *Malaysian Bar & Anor v Government of Malaysia*.[7] I am of the opinion that the non-inclusion (of Parliament) cannot equal exclusion. It might have been thought unnecessary. Pike CJ (Borneo), in *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli (No 2)*[8] at pp 49–50, advised that 'any such action would clearly need to be brought against the Federal Government and not against the Governor of a state or the Chief Minister (de facto or de jure) of that state.' That case can be distinguished on two grounds. Firstly, the fact that Parliament was not cited does not exclude it in an appropriate case, and secondly, the court was, in my opinion, considering the government as a collective body in antithesis to individuals.

Let me refer to the Federal and State Constitutions so as to clearly see the formation, powers and continuity, if applicable, of the Assembly. Firstly, by art 160(1) of the Federal Constitution, 'Legislative Assembly' means 'the representative assembly' in the legislature of a state. The Assembly therefore has powers to make laws for the state. Is the Assembly strong and does it have perpetual or permanent existence? The Sarawak Assembly turned 125 on 8 September whereas the Sabah State Assembly too has a fairly long history. Let me now refer to the Sabah State Constitution which by art 6(6) makes the cabinet collectively responsible to the Assembly. The Assembly, unless sooner dissolved, continues for five years (art 21(3)). Article 24(1) provides for the Assembly to 'regulate its own procedure and may make standing orders for that purpose' and it may act notwithstanding

any vacancy in its membership. Its privileges, immunities or powers may be determined and regulated by the legislature (art 25) which by art 13 is the Assembly itself with the Yang di-Pertua Negeri. Article 26(1) makes it clear that the power of the legislature to make laws shall be exercised by Bills passed by the Assembly.

Based on all these considerations, it is manifest that the Assembly is responsible and accountable for its actions. It cannot pass the buck to 'administrators' or to the 'Clerk of Assembly who is a civil servant'. I can only conclude that the first defendant is not wrongly cited.

Let me now consider the submissions and contentions in respect of the other grounds:

Whether plaintiff has locus standi, ie whether (as explained in De Smith's Judicial Review of Administrative Action (4th Ed) 'he has an immediate personal interest in the subject matter of the proceedings'

The question of locus standi or standing (standing in courts) is separate and distinct from the question of the substantive merits and the legal capacity of the plaintiff.

Lord Wilberforce in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* (or the *Fleet Street Casuals* case[9]) insisted that standing was a threshold issue whilst at the same time maintaining that except in the most obvious cases, it would usually be convenient to postpone consideration of the issue until arguments on the merits.

Datuk Stephen Foo, quoting JP Garner, a professor of public law, in 31 *Modern Law Review*, suggested that 'the court cannot be used as an expert consultant'. I entirely agree with that but what determines the plaintiff's locus standi? The test of whether a plaintiff has locus standi was summarized by Tun Salleh Abbas LP (as he then was), in *Government of Malaysia v Lim Kit Siang*[10] approving the principles set out in *Tan Sri Haji Othman Saat v Mohamed bin Ismail*[11] and *Lim Cho Hock v Government of the State of Perak & Ors.*[12] Dato' Zaki agrees these are the two 'high watermark' (landmark?) cases on that principle. The other case is that of *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor.*[13] Datuk Stephen Foo insists that 'the locus classicus of course on this aspect is *Boyce v Paddington Borough Council* [1903] 1 Ch 109 which was applied by six of the judges in *Onus & Anor v Alcoa of Australia Ltd* (1981) 36 ALR 425.' Datuk Stephen Foo quoted Tan Sri Hashim Yeop Sani CJ (Malaya) from *Government of Malaysia v Lim Kit Siang/United Engineers (M) Bhd v Lim Kit Siang*[10] at p 40:

> What then is the proper law to apply to determine the locus standi of the respondent here? In my opinion, the principle in *Boyce v Paddington Borough Council* [1903] 1 Ch 109 as approved in *Gouriet v Union of Post Office Workers & Ors* [1977] 3 All ER 70 is still the law applicable in this country.

Unfortunately for the defendants, the law on locus standi in the judgment of *Boyce v Paddington Borough Council*[14] was changed. The explanation is neatly provided in the defendants' bundle of authorities at pp 43–45.

Dato' Zaki refers to the plaintiff's further affidavit dated 1 September where at para 4, the plaintiff states that he has a real fear that he 'and the

other members of the Assembly may be expelled in the event we do decide to resign as members of the parties of which we are currently members'. At para 8 of the same affidavit the plaintiff states:

> If I am to resign in the exercise of my rights enshrined in Federal Constitution before a determination by this honourable court on the validity of art 18(2)(d), the Assembly will invariably declare my seat vacant which will automatically trigger a by-election in my constituency. In view of the immunity accorded to the election commission I will not be able to seek legal redress in time to prevent such a by-election notwithstanding the Supreme Court decision. Rights of innocent third party members may also be affected not to mention considerable expenses would have to be expended by the government in the conduct of such a by-election.

The plaintiff cannot get any injunction. Dato' Zaki concluded that Tun Datu Haji Mustapha, the plaintiff, has 'that special interest to see that law is declared to be what it is to be'.

It was held in *Syarikat Perkapalan Selatan Sabah Sdn Bhd v State Government of Sabah & Ors*[15] that 'for a plaintiff to have locus standi, he must show that he is a "person aggrieved".' In that case, the plaintiff had a genuine private interest to be furthered and protected. The appeal and cross-appeal in that case were withdrawn by all the parties. Hence the decision on locus standi may be followed here too.

Courts do not encourage litigation but the trend is to allow (not facilitate) plaintiffs to sue even though they had no real grievance or injury at all. See *Blackburn v A-G*;[16] *R v Greater London Council, ex p Blackburn*[17] and *R v Metropolitan Police Commission, ex p Blackburn.*[18] According to Abdulcader J in *Tan Sri Haji Othman Saat v Mohamed bin Ismail*,[11] '... the reasoning seems to have been that unless the court in its discretion gave the plaintiff a hearing, then no one would bring the matter to court'.

I am inclined towards Lord Denning when he said in *R v Horsham Justices, ex p Farquharson & Anor*,[19] that it would be a grave lacuna in our system of public law if a group or even a single public-spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. In other words, it should suffice if the plaintiff has some genuine interest in having his legal position declared even though he could get no other relief.

The *Australian Conservator Foundation Incorporated v Commonwealth of Australia & Ors*[20] can be distinguished as there, the appellants had no direct association with the possibility of any special damage peculiar to themselves. In our case, the plaintiff is directly affected though Datuk Stephen Foo holds the contrary view.

I am unable to find anywhere in the defendants' submission a strenuous rejection of the plaintiff. Citations from the various judgments may be useful, but only if they relate directly to the facts before us. Here the plaintiff says he is interested in the outcome of the action in court. One can say that, like the elephant, an 'interest' is a difficult animal to describe with exactitude but comparatively easy to recognize when one meets one (JF Garner in 31 *Modern Law Review*, 1968). All of us can discern such an elephant today.

A In the light of the authorities I have discussed, I can see no reason to deny standing to the plaintiff as a person aggrieved, a person very interested and as a member of the Assembly to institute and seek the relief in these proceedings.

B *Is there indeed a cause of action or does the plaintiff delve on theoretical issues?*

Again, as expounded by De Smith and Zamir in their *Judicial Review of Administrative Action* and *Declaratory Judgment* respectively, the defendants argue that a claim for declaration will be treated as raising purely academic issues if the plaintiff has no personal interest whatsoever in the subject C matter of the action. A plaintiff who is personally interested in the subject matter of an action may be refused a declaration on the ground that his claim is premature and is to that extent academic or hypothetical. In the same text, it was added that 'A declaration may be awarded to one with whose legal rights the defendant has already threatened to interfere'. See *Thornhill v Weeks*.[21] In *Pharmaceutical Society of Great Britain v Dickson*[22] the D House of Lords held that the respondent as a member of the society was entitled to test in the courts the validity of a proposed rule of professional conduct.

Can it be postulated in our case today that the plaintiff is put in peril of having his name removed from the register? It is to be observed that the E ethos surrounding the Assembly is something that develops over the years.

Lord Reid, continuing the judgment in *Dickson*'s case[22] at p 420, says: 'But it appears to me that if a member of a profession can show that a particular restriction on his activities goes beyond anything which can reasonably be related to the maintenance of professional honour or standards, the court must be able to intervene.' That is really to ensure that F individuals enjoy some rights in society and the court is the proper forum.

The Supreme Court in *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh*[23] decided that by the time the originating summons came before the learned judge, the matter had become academic. Hence there was no living issue. I am prepared to say that a 'person aggrieved' cannot G include a mere busybody who is interfering in things which do not concern him but can include a person who has a genuine grievance because an order has been made which prejudicially affects his interests as has occurred to the plaintiff and will no doubt recur when he resigns from the party.

The law is full of examples to show that a person whose freedom of activity is challenged can in a proper case have the issue determined so that H he knows where he stands. And I think the plaintiff is such a person today and his claim is therefore not theoretical.

The defendant says there is no dispute in existence

I To illustrate this point, Datuk Stephen Foo cited *Draper v British Optical Association*[24] where Farwell J dismissed the plaintiff's application for an injunction by saying that:

> It may be that, if and when the defendants hold their meeting, they may think it right to seek to enforce against the plaintiff this code of ethics, and if they do, it

may be that they will be acting ultra vires. But until they sought to enforce that code upon the plaintiff I myself do not consider that it is for me to determine the question in the abstract.

The learned counsel for the plaintiff informs the court that the same arguments as today's had been put forward in *Datuk Syed Kechik*'s case[13] by the government. The court rejected these. In our case, Tun Datu Haji Mustapha was, to use Dato' Zaki's description, 'removed once'. And he can be 'removed' again.

The Federal Court in *Datuk Syed Kechik v Government of Malaysia*[13] granted the declarations. Quoted therein [at p 108] was *Ruislip-Northwood Urban District Council v Lee*[25] at p 214 where the court held: 'Nowadays the courts seldom refuse to make orders on ground that it is premature to consider the question'.

Lord Upjohn in *Dickson*[22] says: 'Then, it was said that in any event the action was premature. The objecting member must wait, apparently, until the council think fit to bring him before the statutory committee, it may be years later, for it was said there was no immediate threat to do so. As a matter of common sense this is most unreasonable.' Again we see that court judgments input common sense to achieve some reality in our daily lives.

I am of the opinion that the parties before this court should deliberate on the issues raised by the plaintiff so that it will be possible to settle the disputes immediately and then the parties may act with certainty and not remain under the threat of legal uncertainty.

Is the dispute (between plaintiff and defendants) based on hypothetical facts?

The defendants contended so. The learned state A-G said:

> In the present case there is no indication in the plaintiff's affidavit that he is contemplating leaving his present party UMNO. There is only a vague allegation in para 8 of his affidavit that there are other assemblymen who are prevented from changing parties. This allegation is not based on any evidence but on the plaintiff's opinion and belief. Thus, it is mere speculation and hypothetical. These facts have not yet occurred and may never occur at all. Besides, even if this is true it does not concern the plaintiff as he is merely making speculation about other unknown assemblymen. It is, therefore, submitted that a claim for a declaration based on hypothetical facts and mere speculation should be dismissed.

Support for this was gauged from *Roesin v A-G*.[26] The important finding in that case was that it was an abuse of the process of the court 'for a foreigner' to apply for a declaration whereas the plaintiff today is a citizen and a Sabahan. The learned state A-G also cites the case of *Odhams Press Ltd v London & Provincial Sporting News Agency*.[27] It was held that this goes against the defendant's interests today because in that case, the plaintiff gave no evidence of any specific infringement as the documents were not yet in existence whereas the plaintiff here relies on the Constitution of the State of Sabah read with the Federal Constitution and specifically points to the impugned article.

Finally, the defendant says the dispute has ceased to be of practical significance

The learned state A-G says:

> This is the case where the issue was mature for adjudication but it has passed the stage of maturity and it is by now a dead issue ... Due to the delay in instituting the proceedings, the issue has become an academic one ... At that particular time, when the plaintiff had to vacate his seat as an assemblymen for Usukan under the impugned provision as a result of his resignation from USNO to join UMNO the plaintiff could have sought a declaration that the impugned provision is unconstitutional and therefore null and void. But the plaintiff did not do so ...

Cases of *Howard v Pickford Tool Co Ltd*;[28] *Waterson v Hendon Borough Council*;[29] and *Whyte, Ridsdale & Co v A-G*[30] were cited but in those actions, the plaintiffs were in no way directly interested. That was the finding and the authorities are not relevant to this issue.

And lastly, if I were to grant the declaration, can such a declaration have any practical consequence? In *'Declaratory Judgment'* Zamir said:

> In the foregoing classes the proceedings were dismissed as being instituted either too early or too late. If instituted at the right time they might have been successful. In this respect the fifth class — the last in our classification — differs from the others as it comprises cases in which the issue was brought to court neither too early nor too late. Such cases may nevertheless be theoretical if the grant of the declaration can be for no practical consequence. A declaration will not be made if it cannot have any possible practical result.

In *A-G v Colchester Corporation*,[31] the facts are far different from what we face here today. The Malaysian case of *Karpal Singh v Sultan of Selangor*,[32] Abdul Hamid CJ (Malaya) (as he then was) made observations on the various issues raised above and the learned Chief Justice decided in that case that it was a plain and obvious case where the court, in the exercise of its discretion, should strike out the originating summons as being one which was frivolous, vexatious and an abuse of the process of the court. The court had no jurisdiction as it raised an issue concerning the process of clemency which is not justiciable!

I do not think the issue raised in these proceedings is theoretical in the strict sense of the word or that it is premature.

Conclusion

I have dealt with this case at length because counsel of both parties had put in a lot of effort in their research. The state A-G filed 419 pages of authorities and a 24-page typewritten submission while the plaintiff did likewise, with 199 pages of authorities, several sheets of submissions and three affidavits. It is very much a battle of legal principles. My task would have been lighter if I could decide on the weight of the documents but as it is, I have to consider the weight of the evidence and the implications and bearing of the authorities.

I am unable to describe the plaintiff's claim for a declaration as scandalous, frivolous or vexatious. The plaintiff had been affected by the impugned

article when he resigned from USNO to join UMNO. So the argument that the matter only becomes concrete when the circumstances envisaged in art 18(2)(d) arise in future or when the provisions come to be applied again cannot hold. There cannot be any justification for the contention that the present state of affairs is in posse and not in esse and therefore theoretical, abstract, hypothetical, premature or academic. I am of the opinion that the claim made by the plaintiff raises a present and substantive issue for determination by the court. In fact, the defendants themselves could have applied for a declaration if they had wanted to resolve the doubts and controversy.

Reviewing whether a declaration may be applied for, it will do well for us to remember that by O 15 r 16 of the Rules of High Court 1980 'no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether or not consequential relief is or could be claimed.' Since the decision of the Court of Appeal in *Dyson v A-G*,[33] it has always been accepted that there is jurisdiction to make a declaratory order whether any consequential relief is or could be claimed or not.

Lord Sterndale MR said in *Hanson v Radcliffe Urban District Council*:[34] 'The power of the court to make a declaration ... is now almost unlimited; I might say only limited by its own discretion.' This was affirmed by the Privy Council in *Ibeneweka v Egbuna*.[35] I can only echo Abdoolcader J when in *Lim Cho Hock v Government of State of Perak*[12] at p 151, his Lordship said (and this occurs over the issue before me in these proceedings) that 'there has been in a tropical sense much beating of drums and some exchange of fire and it is evident that only by a curial determination, whichever way it goes, will the one be silenced and the other cease.'

There can be no doubt that the plaintiff's complaints are grave and serious and have even attracted state-wide interest. The situation may be revved to national proportion. But that is the politics which do not concern us today.

In the circumstances of the facts made available to the court and the applicable legal principles, I have to dismiss both the defendants' summons-in-chambers dated 10 June 1992 and 29 July 1992 with costs and order that the plaintiff's application be heard early.

Application dismissed.

Reported by Wong Kian Kheong